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No. 84-813

In the Supreme Court of the United States

OCTOBER TERM, 1984

HERSHEL D. MURVINE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that the district court erred in refusing to instruct the jury on the credibility of accomplice testimony.

1. After a jury trial in the United States District Court for the Northern District of Indiana, petitioner was convicted on one count of conspiring to possess and dispose of goods stolen from interstate shipments and to transport those goods in interstate commerce, in violation of 18 U.S.C. 371; two counts of possessing goods stolen from interstate commerce, in violation of 18 U.S.C. 659; and two counts of interstate transportation of goods stolen from interstate shipments, in violation of 18 U.S.C. 659. He was sen-

tenced to five years' imprisonment. The court of appeals affirmed (Pet. App. 1-11).

The evidence is summarized in the opinion of the court of appeals (Pet. App. 2). It showed that on February 26, 1982, William Kramer acquired five coils of stainless steel wire that he knew had been stolen.[1] Kramer then contacted petitioner, who instructed Kramer to ship the coils to a plant near Chicago, Illinois. Petitioner subsequently sold the coils to Theodore Salmon.

Shortly after this purchase Salmon notified the FBI that he suspected the coils were stolen. The FBI questioned Kramer, who initially denied any wrongdoing but then agreed to cooperate as a confidential informant.

In June 1982, Kramer, without the FBI's knowledge, came into possession of three more stainless steel coils, valued at $36,515, that had been stolen in Toledo, Ohio. Kramer contacted petitioner, who directed Kramer to ship the coils to a warehouse in Chicago. Petitioner, using the name "Robert Martin," later sold the coils to Envoy Stainless Steel Company for $32,925.

2. Kramer testified for the prosecution at petitioner's trial. Petitioner contends that the district court erred in refusing to give the jury an "accomplice instruction" regarding Kramer's credibility.[2]

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[1] The coils, valued at $43,997, had been stolen three days earlier from a freight truck parked outside a restaurant in Hammond, Indiana.

[2] Petitioner requested the following instruction (Defendant's Proposed Jury Instruction No. 22):

> You have heard testimony from WILLIAM L. KRAMER who stated that he was involved in the commission of the alleged crime charged against the defendant HERSHEL

The court of appeals held (Pet. App. 10) that such an instruction was not required because "Kramer's testimony was amply corroborated by recorded conversations, the testimony of other witnesses, and business records." Petitioner does not contest the court of appeals' finding that Kramer's testimony was "amply corroborated." Instead, he argues that the district court should have given an accomplice instruction nevertheless.

At the outset we note that, although petitioner requested an accomplice instruction, he did not object to the court's failure to give one. Accordingly, he neglected to preserve his claim. See Fed. R. Crim. P. 30; *Allis* v. *United States*, 155 U.S. 117, 122 (1894); *United States* v. *Gratton*, 525 F.2d 1161, 1162 (7th Cir. 1975) ("[t]he mere offer of the instruction does not preserve the error for appeal").

In any event, the district court did not commit reversible error, if it committed error at all, in declining to give an accomplice instruction. Petitioner cites (Pet. 14-18) a number of cases in which convictions based upon uncorroborated accomplice testi-

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MURVINE. You may give his testimony such weight as you feel it deserves, keeping in mind that it must be considered with caution and great care.

The court did, however, give the following informant instruction to the jury (Tr. 660):

You have heard testimony that William L. Kramer has received benefits from the Government in connection with this case.

You may give his testimony such weight as you feel it deserves, keeping in mind that it must be considered with caution and great care.

Thus, when read in its entirety, the jury charge clearly pointed out the need for "caution and great care" in weighing Kramer's testimony.

mony were reversed because of the absence of a requested cautionary instruction.[3] Those cases offer no guidance for situations such as this case, where the accomplice's testimony was "amply corroborated" (Pet. App. 10). In such circumstances, the courts of appeals have held either that an accomplice instruction is not required or that the failure to give such an instruction, although error, does not require reversal. See, *e.g.*, *United States* v. *McCabe*, 720 F.2d 951, 955-956 (7th Cir. 1983); *United States* v. *Shuckahosee*, 609 F.2d 1351, 1356-1357 (10th Cir. 1979); *United States* v. *Wright*, 573 F.2d 681, 685 (1st Cir.), cert. denied, 436 U.S. 949 (1978); *United States* v. *Lee*, 506 F.2d 111, 119-120 (D.C. Cir. 1974), cert. denied, 421 U.S. 1002 (1975); *United States* v. *Clark*, 480 F.2d 1249, 1254 (5th Cir.), cert. denied, 414 U.S. 978 (1973); *United States* v. *Holt*, 427 F.2d 1114, 1117-1118 (8th Cir. 1970); *United States* v. *Cianchetti*, 315 F.2d 584, 592 (2d Cir. 1963); *Christy* v. *United States*, 261 F.2d 357, 361 (9th Cir. 1958); *Pittsburgh Plate Glass Co.* v. *United States*, 260 F.2d 397, 402 (4th Cir. 1958), aff'd, 360 U.S. 395 (1959). Indeed, there is no indication that any of the courts of

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[3] For example, the Ninth Circuit has held that it is error to refuse an accomplice instruction where the accomplice's testimony "supplies the only strong evidence of guilt." *United States* v. *Patterson*, 648 F.2d 625, 631 (9th Cir. 1981). Where, as here, the accomplice's testimony is strongly corroborated by other evidence, it cannot be regarded as "the only strong evidence of guilt." At all events, the Ninth Circuit has also held that where the trial court instructs the jury that it must examine a witness's testimony with care because he was an informant who received benefits from the government, it need not also give an accomplice instruction. *United States* v. *Morgan*, 555 F.2d 238, 242-243 (9th Cir. 1977). Here, the trial court gave such an informant instruction concerning Kramer (see note 2, *supra*).

appeals on whose decisions petitioner relies would regard the failure to give an accomplice instruction in the instant circumstances as reversible error.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

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